APPENDIX A

STATUTES, REGULATIONS AND REVENUE RULINGS INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 3121. DEFINITIONS.

* * * * * * *

"(d) **Employee.**—For purposes of this chapter, the term 'employee' means—

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"(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or"

* * * * * * *

Treasury Regulations on Employment Tax (26 C.F.R.):

"§ 31.3121(d)-1 **Who are employees.**

* * * * * * *

"(c) **Common law employees.** (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

"(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary

that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case."

* * * * * * *

The pertinent statutory and Treasury Regulation provisions pertaining to Withholding and Federal Unemployment Taxes are contained at 26 U.S.C., Section 3401(c) and 26 U.S.C. 3306(i) and Treasury Regulations 31.3401(c)-1 and 31.3306(i)-1, which are substantially identical.

Rev. Rul. 66-267. 1966-2 Cum. Bull. 443.

26 CFR 31.3121(d)-1: Who are employees.

(Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

A cab company leases taxicabs, which are equipped with two-way radios and fare recording meters, to drivers on a day-to-day basis under an agreement which is terminable by either party at the end of the day. The company maintains an office to receive calls from customers and a radio transmitter to relay the calls to the drivers. It also services and repairs the taxicabs, furnishes the gasoline, oil, grease, and antifreeze, and carries public liability insurance. The drivers are required to furnish meter and trip reports. The drivers pay the company a percentage of their gross fares as rental for the taxicabs and retain the balance as compensation for their services. **Held**, the drivers are employees of the company for Federal employment tax purposes.

The Internal Revenue Service has been asked to determine whether taxicab drivers who perform services for a cab company under the circumstances described below are employees for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24, respectively, subtitle C, Internal Revenue Code of 1954).

The cab company owns 20 motor vehicles which are licensed for use as taxicabs pursuant to the ordinances of the city regulating the operation of automobiles for hire. Each driver enters into a written "Lease Rental Agreement" with the company which designates the company as lessor and the driver as lessee. The agreement provides that the lessor will rent a taxicab to the lessee on a day-to-day basis, terminable by either party at the end of the day. The lessee agrees to pay the lessor as rental an amount

equal to 60 percent of his gross fares (excepting tips) during each rental period.

Each taxicab, which is painted with the company's name and insignia, is equipped with a two-way radio and a fare recording meter. The company advertises in newspapers and maintains an office to receive calls for passenger pick-ups and a radio transmitter to relay the calls to the drivers. Customers are also obtained by personal solicitation of the individual drivers and any call requesting a particular driver is relayed to that driver. The drivers call the company's dispatcher after each passenger is delivered and report their locations. A driver may refuse to accept a call given him by the dispatcher but the company will not renew his agreement if he fails to produce a sufficient volume of business. The drivers are not permitted to use the taxicabs for their personal use.

The drivers are required to furnish the company with meter and trip reports which show the origin and destination of each trip made and the amount of the fare. The fare schedule is fixed by the city taxicab ordinance. The city provides taxicab stands and does not permit cruising.

The company maintains a garage where it services and repairs the taxicabs (including the radios and meters), furnishes the gasoline, oil, grease, and antifreeze, and pays for and carries public liability insurance. The drivers' only investment is a State chauffeur's license.

If a driver does not report for duty at the beginning of a shift the company may lease the cab he usually drives to another driver. At the end of each rental period the gross fares are balanced with the trip and meter reports and the drivers pay the company its percentage of the gross fares and retain the balance.

The drivers are employees for Federal employment tax purposes if they have the status of employees under the usual common law rules applicable in determining the em-

ployer-employee relationship. Guides for determining that status are found in three substantially similar sections of the Employment Tax Regulations; namely, sections 31.3121 (d)-1(c), 31.3306(i)-1, and 31.3401(c)-1.

Section 31.3121(d)-1(c) of the regulations provides, in part, as follows:

* * * In general, if an individual is subject to the control and direction of another **merely as to the result** to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. * * * Individuals * * * engaged in the pursuit of an independent trade, business, or profession, in which they **offer their services to the public**, are independent contractors and not employees. * * * [Emphasis supplied.]

Where it is difficult to determine whether or not the lessor controls the situation "merely as to the result" and whether or not it can be said that the drivers "offer their services to the public," it is necessary to take other factors into consideration in addition to those specifically set forth in the regulations. Section 220 of the Restatement of the Law of Agency, which has been cited with approval in court cases deciding common law employer liability, states in part as follows:

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

* * * * * * *

(b) whether or not the one employed is **engaged in a distinct occupation or business**;

* * * * * * *

(h) whether or not the work **is a part of the regular business of the employer**;

* * * * * * *

[Emphasis supplied.]

In cases involving the status of driver-lessees the situation must be looked at with considerably more emphasis on the restatement's points with respect to whether or not the one employed is "engaged in a distinct occupation or business" and whether or not the work that he does "is a part of the regular business of the employer." Thus, attributes which are essential to the successful operation of a taxicab business, such as two-way radio communication and the use of a dispatcher, meter and trip reports, and the use of advertising media to make the system available for public use virtually foreclose treatment of a driver-lessee as other than an employee. Basing the rental on a sharing of gross receipts is an additional factor tending to demonstrate that the driver-lessee operates as part of such business rather than otherwise.

It is concluded, upon the basis of the stated facts, that the cab company exercises, or has the right to exercise, such direction and control over the taxicab drivers in the performance of their services as is necessary to establish the relationship of employer and employee under the usual common law rules. The drivers are not engaged in independent business enterprises requiring the outlay of capital or the assumption of business risks. The company is the one who is authorized and licensed under the ordinances of the city to operate a taxicab business and it necessarily retains the right to direct and control the drivers in the performance of their services in order to protect its investment and to insure the receipt of adequate income in return for its financial risks. Accordingly, the taxicab drivers performing services for the company under the circumstances described above are employees of the company for Federal employment tax purposes.

The conclusion in this case is consistent with the decision in the case of **United States v. Fleming**, 293 F.2d 953 (1961).

Rev. Rul. 71-572, 1971-2 Cum. Bull. 347

Withholding of tax on wages: Employer-employee relationship: Cab driver: Operation of cabs under lease agreement.—Whether taxicab drivers operating vehicles under a "lease" agreement with a taxicab company are employees of the company is dependent upon controls exercisable by the company that are not economically beneficial to the lessee's interest; Mim. 6652 and Revenue Ruling 66-267 superseded.

The purposes of this Revenue Ruling are to update and restate, under the current statute and regulations, the positions set forth in Mim. 6652, C. B. 1951-2, 162 (see Situation 2 below) and Revenue Ruling 66-267, C. B. 1966-2, 443 (see Situation 1 below).

The issue presented is whether taxicab owners or operators, carrying on their transportation services pursuant to "lease" agreements with a taxicab company under the circumstance described below are employees of the taxicab company for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source (chapters 21, 23, and 24, respectively, Internal Revenue Code of 1954).

Individuals are employees for Federal employment tax purposes if they have the status of employees under the usual common law rules applicable in determining the employer-employee relationships. Guides for determining that status are found in three substantially similar sections of the Employment Tax Regulations, namely, sections 31.3121 (d)-1, 31.3306(i)-1, and 31.3401(c)-1.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means

by which the result is accomplished. That is, the employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct and control the manner in which the services are performed; it is sufficient if he has the right to do so.

In the cases of "leases" of taxicabs, the first question to be asked is whether a valid lessor-lessee relationship exists since, if it does, an employer-employee relationship cannot exist at the same time between the same parties with respect to the same subject matter. However, some of the "control" factors usually considered relevant in determining whether or not an employer-employee relationship exists are equally relevant in determining the existence of a valid lessor-lessee relationship. Thus, the use of two-way radio communication, dispatchers, and advertising media, although usually considered important factors in establishing an employer-employee relationship in taxicab cases, is not repugnant to the interests of both lessor and lessee in a true lessor-lessee relationship since it will enhance the lessee's profits by making more "trips" available to him at the same time that it increases the lessor's ability to rent his taxicabs to the optimum extent, thereby increasing his profits.

On the other hand, "controls" which are not economically beneficial to the lessee's interests (or are even detrimental), tend to suggest both that a lessor-lessee relationship does not actually exist and that an employer-employee relationship does. None of the "control" factors mentioned above are of this latter type.

In each of the situations described below, the company operating the taxicab system provides the services mentioned above that are generally provided in the operation of a taxicab business, namely, two-way radio communica-

tion, the use of a dispatcher, and the use of advertising media. However, the following differences exist:

Situation 1. The taxicab company owns the taxicabs and "leases" them to taxicab operators who pay as a regular fee a set percentage of the fares they collect. In order to insure that it receives the proper amount, the company requires the submission of financial reports by the operators showing the amounts of the fares they have received for providing taxicab services.

It is concluded, upon the basis of the stated facts in the instant situation that the taxicab company exercises, or has the right to exercise, such direction and control over the taxicab operators in the performance of their services as is necessary to establish the relationship of employer-employee under the usual common law rules. The receipt-sharing arrangement diminishes the likelihood of a true lessor-lessee relationship since the company necessarily retains the right to direct and control the drivers in the performance of their services, including requiring an accounting from them with respect to the fares that they have collected, in order to protect its investment and to insure the receipt of the maximum amount of income possible in return for its financial risks. Accordingly, it is held that the taxicab operators who use the taxicabs furnished by the company under the circumstances described above are employees of the company for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages.

Situation 2. The taxicab company has (a) a contractual relationship with taxicab owners who operate their own cabs and pay the company only fixed fees at regular intervals for its services in connection with the operation of their cabs, or (b) a "lessor-lessee" relationship with taxicab operators who pay only fixed fees at regular intervals for the use of both the company's taxicabs and services.

The company does not require an accounting by the owner or operator of the fees received, its interest being limited to the receipt of fixed fees at regular intervals.

It is concluded, upon the basis of the stated facts in the instant situation, that the taxicab company does not exercise, nor does it have the right to exercise, such direction and control over the taxicab owners or the taxicab operators in the performance of their services as is necessary to establish the relationship of employer-employee under the usual common law rules. The company has only the right to receive the specified regular payment. It has no right to obtain, for its own benefit, an accounting with respect to the fares collected for operation of the taxicabs by either the owers or the "lessees". In the case of the "lessees," it possesses no other "control" factors that would be detrimental to their interests and negate a true lessor-lessee relationship. Accordingly, it is held that the taxicab owners who utilize the services of the company and the taxicab operators who use the taxicabs and services provided by the company under the circumstances described above are not employees of the company for Federal employment tax purposes. However, their income from the operation of the taxicabs must be taken into account in computing net earnings from self-employment for purposes of the Tax on Self-Employment Income (chapter 2 of subtitle A of the Code) and in determining whether they are required to file declarations of estimated income tax and self-employment tax returns under sections 6015 and 6017 of the Code.

Compare Revenue Ruling 71-571, page 27, this Bulletin, concerning the status of drivers who purchase their taxicabs from a taxi association under conditional sales agreements.

Mim, 6652, C. B. 1951-2, 162, and Revenue Ruling 66-267, C. B. 1966-2, 443, are superseded, since the positions set forth therein are restated in current law in this Revenue Ruling.

APPENDIX B

OPINIONS IN THE COURTS BELOW

United States Court of Appeals
For the Eighth Circuit

No. 72-1348

Air Terminal Cab, Inc., Appellee, vs. United States of America, Appellant. Airway Taxi Company, Inc., Appellee, vs. United States of America, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 10, 1973.

Filed: April 30, 1973.

Before Lay, Heaney and Stephenson, Circuit Judges.

Stephenson, Circuit Judge.

The question before the Court is whether drivers of respondent's taxicabs are employees within the provisions

of the Federal Insurance Contributions Act (FICA) (26 U.S.C. § 3101 *et seq.*) and the Federal Unemployment Tax Act (FUTA) (26 U.S.C. § 3301 *et seq.*), which impose taxes on employers to finance government benefits for employees.

These consolidated cases are suits for refund by two taxicab companies of partial payment of an assessment of withholding, FICA and FUTA taxes, penalties and interest allegedly owed by the plaintiffs. The plaintiff taxpayers have each paid one quarter of the alleged liabilities under protest.[1] The Government counterclaimed below for alleged liabilities for other quarters. The years in question are 1965 through 1968. The District Court for the Eastern District of Missouri, Judge Wangelin presiding, found that the taxicab drivers were not employees for purpose of federal income tax withholding, FICA and FUTA taxes. **Air Terminal Cab, Inc. v. United States**, 341 F. Supp. 1257 (E.D. Mo. 1972).

The resolution of the question whether the taxicab drivers are employees must be made by applying common law definitions of "employee" and "independent" contractor. It was thought by some that the decisions in **United States v. Silk**, 331 U.S. 704 (1947) and **Bartels v. Birmingham**, 332 U.S. 126 (1947) resulted in a more relaxed meaning of the term "employee" as used in the tax statutes. Shortly after those decisions, however, Congress amended the definition sections of the pertinent acts to make it clear that the term "employee" should be read "under the usual common law rules." 26 U.S.C. § 3121 (d)(2) and § 3306(i). **See** H. Conf. Rep. No. 2771, 81st Cong. 2d Sess. p. 104. **See also, Hoosier Home Improvement Company v. United States**, 350 F.2d 640, 642 (CA 7 1965).

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[1] Alleged liability for Air Terminal for all taxes due is stipulated to be $71,235.02. Airway's liability is $60,778.86.

The working relationship between the taxicab drivers and the appellees is undisputed and the facts are fully stipulated. The pertinent facts necessary for determination of the issue are as follows: Appellees, Air Terminal Cab, Inc. (Air Terminal) and Airway Taxi Company (Airway) are corporations organized and existing under and by virtue of the laws of Missouri. The method of operation of the two companies is substantially similar, but each is separately owned and operated. The two companies obtained franchises from St. Louis County to operate a specified number (12 each) of taxicabs within that county. Their cabs can only pick up passengers within the unincorporated areas of St. Louis County. The primary source of passengers in this restricted area is Lambert Airfield where passengers are picked up by the taxicabs waiting in line. The County granted franchises to appellees whose businesses involve company owned cabs operated by drivers who receive their compensation by retaining a percentage of the fares collected.

The companies do not have formal business offices but are operated from the homes of their respective presidents. They do not advertise nor do they have listed telephone numbers in the telephone directory. The taxicabs owned by the companies are not radio equipped, nor is there any kind of an operational dispatcher system. The drivers do not regularly report their whereabouts, nor do they receive instructions from the company presidents. The presidents may, if it becomes necessary to contact a driver, leave messages at the service stations where the taxicabs are left overnight, or they may call the drivers at their homes after working hours.

The taxicabs used in the businesses were owned and insured for liability by appellees. The drivers do not carry any insurance on their operation of the taxicabs. They are equipped with fare meters and have the company name,

either "Lambert Airfield Cab, Co." or "Lambert Airport Cab, Co." painted in black letters on the door. When not in use, the taxicabs owned by each company are parked at separately owned service stations, in return for which each company contracts out to the particular service station the minor maintenance work needed on the taxicabs.

During the years in suit—1965 through 1968—the drivers of the companies' taxicabs operated in the following way:

(a) At the beginning of their shifts, each of the drivers pick up the taxicab he is to drive at the service station where the particular drivers' company keeps the taxicabs pursuant to the maintenance-parking arrangement described above.

(b) From the service station, the drivers usually proceed directly to Lambert Airfield to pick up fare-paying passengers.

(c) After a passenger has been left at his destination, the drivers usually return directly to Lambert Airfield to pick up another fare-paying passenger. A driver makes an average of six (6) trips a day, consisting of transportation of a passenger from Lambert Airfield to the passenger's destination and return to the Airfield.

(d) The drivers maintain a trip sheet on which is to be noted the pick up point and destination of each fare-paying passenger and the amount of the fare paid by each passenger.

(e) At the end of the shift, each driver deducts from the total amount of fares collected, the amount expended for gasoline and oil. The amount remaining is then divided equally between the company and the driver. The driver takes the company's share and puts it in an envelope then along with the trip sheet drops the envelope through a slot in a metal strong

box at the service station where the taxicabs are parked when not in use. The driver retains his own share of the fares collected and receives no other remuneration. These envelopes are picked up regularly by the president of the company. The trip sheets and envelopes are furnished to the drivers by the companies.

(f) The drivers do not use the taxicabs for their personal use. At the end of their shift, the drivers return the taxicabs to the service station to be parked and left until the next shift.

The drivers who drive the taxicabs owned by the plaintiff companies, as well as drivers for other taxicab companies in the St. Louis and St. Louis County areas, are organized into and are members of Local 688 Warehouse and Distribution Workers Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs and Warehousemen of America. Pursuant to contracts entered into with Local 688, effective September 1, 1965 and extending through 1968, "owner-drivers"[2] are regarded as employees of taxpayers and taxpayers reserve "the right to control, the manner, means and details of, and by which the owner-operator performs his services, as well as the ends to be accomplished."

The drivers are required to work a minimum of nine hours per day, five days per week pursuant to the union contract. They may work a maximum of 14 hours per day and six days per week. In addition, starting times and days to be worked are set by taxpayers. After drivers have completed one year of work they are entitled to a

[2] Appellees in their brief contend that the term "owner-drivers" found in the labor contract excludes their drivers because they do not own their own taxicabs. We agree. Read in its entire context, the labor contract's use of the term refers only to situations where the driver owns his own cab. Other parts of the labor contract, however, do apply to the appellees' drivers.

one-week paid vacation, sick leave benefits, and specified paid holidays. Article XII of the union contract gives the companies the right to discharge drivers pursuant to the union grievance procedure.

The issue of whether an employer-employee relationship exists for purposes of employment taxes has generally been held to be one of fact. **Saiki v. United States**, 306 F.2d 642, 648 (CA8 1962); **American Consulting Corp. v. United States**, 454 F.2d 473, 477 (CA3 1971); **Lanigan Storage & Van Co. v. United States**, 389 F.2d 337, 340-341 (CA6 1968); **Lifetime Siding, Inc. v. United States**, 359 F.2d 657, 662 (CA2 1966); **Hoosier Home Improvement Co., Inc. v. United States**, 350 F.2d 640, 643 (CA7 1965); **McGuire v. United States**, 349 F.2d 644, 646 (CA9 1965); **Service Trucking v. United States**, 347 F.2d 671, 672 (CA4 1965).

In the instant case the trial court likewise held it was a question of fact, stating at page 1263 of 341 F.Supp.:

> "The question of plaintiffs' control over the manner and means of the operation of the taxicab is a **factual question.** Considering all factors, the Court concludes that the plaintiff had little, if any, control over the means and method by which the drivers performed their services." (emphasis added)

However, this Court has not hesitated to reverse where the evidence did not support the conclusion reached by the trier of fact. **Saiki v. United States**, *supra*, 306 F.2d 642, 652 (CA8 1962); **United States v. Kane**, 171 F.2d 54 (CA8 1948).

Where the facts are stipulated "and there is no conflict in the evidence, or in the inferences which reasonably can be drawn therefrom, this court may rule upon the question of law presented and is not restricted by the limitation of Rule 52(a) F.R. Civ. Proc." **United States v. Kavanaugh**, 308 F.2d 824, 828 (CA8 1962); **United States v. Mississippi**

Valley Barge Line Co., 285 F.2d 381, 388 (CA8 1960); **Compare, Commissioner v. Duberstein**, 363 U.S. 278, 291 (1960); **Azad v. United States**, 388 F.2d 74, 78 (CA8 1968).

Moreover, even if we would apply the "clearly erroneous" rule, the Supreme Court has pointed out that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." **United States v. U. S. Gypsum Company**, 333 U.S. 364, 395 (1948). In the case at bar the facts are largely stipulated and there is no dispute as to them. Whether the question for determination is viewed as one of fact or law, we are convinced that under applicable standards a mistake has been committed in the result arrived at by the trial court.

This Circuit has not directly passed on the question of whether a taxicab driver is an employee for federal employment tax purposes. The two leading cases in this area appear to be **Party Cab Company v. United States**, 172 F.2d 87 (CA7 1949), **cert. denied**, 338 U.S. 818 (1949) and **United States v. Fleming**, 293 F.2d 953 (CA5 1961). In **Party Cab** the taxicab drivers worked essentially on a rental basis whereby they paid a fixed fee for the use of a cab and were subject to little control over their daily routine other than fixed working hours. The court held that the drivers were not employees for employment tax purposes. In **Fleming**, the drivers were directed to pickups by radio dispatcher calls, were required to account for their trips by use of trip reports, were subject to discharge, did not pay for their own gas and oil, and were required to split their fares with the company (65% to the company). In finding that the taxicab drivers were employees, the court in **Fleming** relied heavily on the fare-splitting arrangement between the drivers and the company. 293 F.2d at 957. The court there stated:

> "The large measure of control here present, the operation by the Company of a taxi **business** rather than merely a **renter** of cabs, and other factors require a determination that the employer-employee relationship existed." (emphasis added)

We stated, *supra*, that common-law tests are to be used to determine the status of the taxicab drivers. These common law tests mentioned in the Internal Revenue Code sections here involved, 26 U.S.C. §§ 3121(d)(2) and 3306(i), are elaborated in corresponding sections of the Treasury Regulations, 26 C.F.R. §§ 31.3121(d)-1 and 31.3306(i)-1, which provide:

> "Generally such relationship exists [of employer-employee] when the person for whom services are performed has the **right** to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, **it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.** The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services."
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> * * *
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> "Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case." (emphasis added)

Thus, control, either actual or the right to it, is the basic test used to determine the relationship in question. Here there were no supervisory employees, no offices, no garages, no radios, no dispatchers, no telephones, and no regular contact between appellees and their drivers. On the other hand, the drivers had regular working hours, were limited as to where they could pick up customers, could not use cabs for their personal use, were required to account for fares by submitting "trip sheets," and were required to split (after deducting amounts spent for gas and oil) their fares evenly with appellees. This arrangement closely resembles that in **Fleming**, *supra*, where the court held that the taxpayers were conducting a business as a common carrier with employees rather than the rental operation as found in **Party Cab**, *supra*. The Internal Revenue Service has also ruled that the receipt or fare sharing arrangement diminishes the likelihood of a true lessor-lessee relationship because of the company's interest in receipt of the maximum amount of income possible in return for its financial risks. Rev. Rul. 71-572, 1971-2 Cum. Bull. 347.[3] Where

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[3] Revenue Ruling 71-572 was issued in 1971 after the appellees filed their suits for refund on May 21, 1971.

Attached to the stipulation of facts in the record is a letter ruling by the Internal Revenue Service to the District Director of St. Louis, Mo., which pertains to Laclede Cab Co. and Red Top Cab Company which also operate under franchises in St. Louis County. Appellee relies on this letter for support. In those situations a daily rental fee was paid by the drivers for the use of the taxicabs. The drivers could use the taxicab for a maximum shift, obtain orders from the company's radio dispatcher and generally operate as a taxicab. There was a union contract, similar to those herein. The driver, however, paid all expenses and retained for himself all fares. It was held by the I.R.S. that the Laclede and Red Top drivers were not employees for employment tax purposes. The instant case is distinguishable, however, in the method that the financing is arranged. The Laclede and Red Top drivers rented the taxicabs and ran their own businesses, quite similar to the **Party Cab** case. The fare-splitting arrangement in the instant case is similar to Fleming where a similar arrangement resulted in the employer-employee relationship.

a company has a general measure of control over the manner in which services of their taxicab drivers are performed, such as operation in a restricted territory, control of hours worked, and the governing of income to the drivers, the employer-employee relationship exists for purposes of the federal employment taxes. **Cf. Westover v. Stockholders Publishing Co.**, 237 F.2d 948 (CA9 1956).

Even if actual control was absent, it is the **right** to control which is determinative. In **McGuire v. United States**, 349 F.2d 644, 646 (CA9 1965), the court stated:

> "The absence of need to control should not be confused with the absence of right to control. The right to control contemplated by the Regulations relevant here and the common law as an incident of employment requires only such supervision as the nature of the work requires."

Where the nature of a person's work requires little supervision, there is no need for actual control. Some occupations such as unloaders, see **McGuire**, *supra*; **United States v. Kane**, 171 F.2d 54, 59 (CA8 1948), or doctors, **Cody v. Ribicoff**, 289 F.2d 394 (CA8 1961); **Fleming v. Huycke**, 284 F.2d 546 (CA9 1960), are unsuited to direction and close control by an employer. In the instant case, the nature of appellees' businesses simply do not require close hour by hour supervision, but the right to control is not lacking.[4]

Other factors in this case lead us to believe that the employer-employee relationship exists. The cab drivers

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[4] Appellees base much of their argument on the fact that the taxicabs are not equipped with two-way radios or any kind of a dispatcher system. The nature of the appellees' businesses is such that such a system is unnecessary because almost all passengers are picked up at the airport on a random basis. This feature is not determinative of control. Almost all of the taxicab cases we have read involve a dispatcher system of some type, but the decisions have gone both ways.

have no capital investment in the business. They do not even supply their own oil or gas. All they provide is their labor since the company owns the taxicabs and purchases liability insurance. Daily reporting sheets must be submitted by the drivers to the company. The appellees may discharge the drivers for cause pursuant to the labor contract. See Treasuray Regulations, *supra*. Moreover, the companies provide fringe benefits such as paid vacations and holidays, sick leave, and pension plans. All of these are consistent with an employer-employee relationship.[5] These taxicab drivers were performing personal services constituting an integral part of appellee's business operations. They were not pursuing any separate trade, business, or profession involving capital outlay and were subject to general control over the manner and means of performing their services. They were, in effect, common-law employees for purposes of federal employment taxes here involved.

Reversed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[5] **See** Restatement (Second) of Agency § 220 (1958) for a summary of common law factors to be considered in finding the employer-employee relationship. Missouri has accepted the criteria set out in the Restatement of Agency for determining whether or not an employer-employee relationship exists. **Dean v. Young**, 396 S.W. 2d 549, 553 (Mo. 1965). The element of control, or right to control is most frequently used in Missouri cases as distinguishing a servant from an independent contractor. *Id.* Thus, Missouri's common law on this issue is consistent with the federal law.

Air Terminal Cab, Inc. v. United States

Cite as 341 F.Supp. 1257 (1972)

AIR TERMINAL CAB, INC., Plaintiff,

v.

UNITED STATES of America, Defendant.
AIRWAY TAXI COMPANY, Inc., Plaintiff,

v.

UNITED STATES of America, Defendant.

Nos. 71 C 323(4), 71 C 324(4).

United States District Court,
E. D. Missouri, E. D.

April 5, 1972.

Consolidated suits by two taxicab companies for refund of partial payment of assessment of withholding, Federal Insurance Contribution Act and Federal Unemployment Tax Act taxes, penalties and interest, in which the Government counterclaimed for balance allegedly due. The District Court, Wangelin, J., held that where taxicab drivers did not report to or "check in" with taxicab companies in any way during time drivers were in possession of cabs, companies had no way to contact drivers, or to supervise or direct activities of drivers while they possessed cabs and companies carried no workmen's compensation insurance and there were no minimum wages, cab companies were not employers for purpose of federal income tax withholding provision, Federal Insurance Contribution Act and Federal Unemployment Tax Act, notwithstanding that cab companies split net fares with drivers, that companies owned cabs and fixed time and days which drivers worked and could discharge drivers at will.

Judgment for plaintiffs.

1. Internal Revenue Key 1167.3, 1766.3

Common-law rules are to be used in determining whether an employer-employee relationship exists for purpose of federal income tax withholding, Federal Insurance Contribution Act and the Federal Employment Tax Act; the element of control is essential to the existence of such a relationship. 26 U.S.C.A. (I.R.C. 1954) § 3401(d).

2. Internal Revenue Key 1167.4

Fare-splitting arrangement between taxicab companies and drivers did not conclusively establish that companies were employers for purpose of federal income tax withholding provisions, Federal Insurance Contribution Act and the Federal Unemployment Tax Act. 26 U.S.C.A. (I.R.C. 1954) § 3401(d).

3. Internal Revenue Key 1167.4, 1766.3

Where taxicab drivers did not report to or "check in" with taxicab companies in any way during time drivers were in possession of cabs, companies had no way to contact drivers, or to supervise or direct activities of drivers while they possessed cabs and companies carried no workmen's compensation insurance and there were no minimum wages, cab companies were not employers for purpose of federal income tax withholding provision, Federal Insurance Contribution Act and Federal Unemployment Tax Act, notwithstanding that cab companies split net fares with drivers, that companies owned cabs and fixed time and days which drivers worked and could discharge driver at will. 26 U.S.C.A. (I.R.C. 1954) § 3401(d).

Lashly, Caruthers, Rava, Hyndman & Rutherford, St. Louis, Mo., for plaintiffs.

Daniel Bartlett, Jr., U. S. Atty., St. Louis, Mo., Michael C. Durney, Trial Atty., Tax Division, Dept. of Justice, Washington, D. C., for defendant.

MEMORANDUM

WANGELIN, District Judge.

These consolidated cases are suits for refund by two taxicab companies of partial payment of an assessment of withholding, Federal Insurance Contribution Act (FICA), and Federal Unemployment Tax Act (FUTA), taxes, penalties and interest allegedly owed by plaintiffs. The plaintiff taxpayers have each paid one quarter of the alleged liabilities under protest. The Government has counterclaimed for alleged liabilities for other quarters, and thus the question of the total alleged liability is in issue for each plaintiff for the years 1965 through 1968.

The parties have entered into a Stipulation of Facts and Issue of Law, and have filed briefs in support of their respective positions and have presented oral arguments to the Court. The Court adopts the Stipulation of Facts and Issue of Law as its Findings of Fact.

Plaintiffs, Air Terminal Cab, Inc. (hereinafter referred to as Air Terminal), and Airway Taxi Company, Inc. (hereinafter referred to as Airway), are corporations organized and existing under and by virtue of the laws of the State of Missouri, with their principal offices and places of business in St. Louis County, Missouri, within the Eastern Division of the Eastern District of Missouri.

On or about September 18, 1970, the Commissioner of Internal Revenue assessed withholding, Federal Insurance Contribution Act (FICA), and Federal Unemployment Tax (FUTA) taxes, penalties, and interest against Air Terminal and Airway in the following amounts for the following periods:

A. AIR TERMINAL

Type of Tax	Period	Amount
Withholding—FICA	3/31/65	$ 2,506.47
	6/30/65	3,351.40
	9/30/65	3,263.25
	12/31/65	4,123.67
	3/31/66	4,543.71
	6/30/66	4,227.44
	9/30/66	4,402.49
	12/31/66	4,888.56
	3/31/67	5,177.48
	6/30/67	5,352.98
	9/30/67	4,581.25
	12/31/67	5,714.78
	3/31/68	5,950.73
	6/30/68	5,952.51
FUTA	1965	$ 2,410.21
	1966	2,202.26
	1967	2,582.83
	Total	$71,235.02

B. AIRWAY

Type of Tax	Period	Amount
Withholding—FICA	3/31/65	$ 3,362.74
	6/30/65	3,432.71
	9/30/65	3,399.54
	12/31/65	3,369.71
	3/31/66	3,514.04
	6/30/66	3,478.72
	9/30/66	3,656.07
	12/31/66	3,761.83
	3/31/67	2,951.69
	6/30/67	2,914.49
	9/30/67	4,620.53
	12/31/67	5,896.38
	3/31/68	5,501.59
	6/30/68	5,148.12
FUTA	1965	$ 1,611.80
	1966	1,673.90
	1967	2,485.10
	Total	$60,778.86

On or about October 8, 1970, Air Terminal paid the sum of Four Thousand One Hundred Twenty Three Dollars and Sixty Seven Cents ($4,123.67) with respect to the withholding and FICA taxes assessed against it for the fourth quarter of 1965 (ending December 31, 1965), and timely

filed with the Internal Revenue Service a claim for refund (Form 843) thereof. On or about September 23, 1970, Airway paid the sum of Three Thousand Three Hundred Sixty Nine Dollars and Seventy One Cents ($3,369.71) with respect to the withholding and FICA taxes assessed against it for the fourth quarter of 1965 (ending December 31, 1965), and timely filed a claim for refund (Form 843) thereof.

On or about September 28, 1970, Air Terminal paid the sum of Two Thousand Four Hundred Ten Dollars and Twenty One Cents ($2,410.21) with respect to the FUTA taxes assessed against it for 1965, and timely filed a claim for refund thereof. On or about September 28, 1970, Airway paid the sum of Four Hundred Ninety Dollars and Eighty One Cents ($490.81) with respect to the FUTA taxes assessed against it for 1965, and timely filed a claim for refund (Form 843) thereof.

On May 21, 1971, Air Terminal and Airway timely filed the instant suits, vesting this Court with jurisdiction over the subject matter of the suits by virtue of 28 U.S.C., Section 1346(a)(1).

Defendant has counterclaimed for the unpaid balances of the withholding, FICA and FUTA taxes, penalties, and interest assessed against Air Terminal and Airway for taxable periods other than the fourth quarter of 1965. At the time the foregoing payments were made by plaintiffs, plaintiffs stated to the Internal Revenue Service that said payments were made under protest.

The method of operation of the two plaintiff companies is substantially similar, but each is separately owned and operated.

The business licenses or franchises obtained by Air Terminal and Airway from St. Louis County permit the companies to operate a specified number of taxicabs within St. Louis County, with the limitation that the taxicabs can

pick up passengers only within the unincorporated areas of St. Louis County. The primary source of passengers in the unincorporated areas of St. Louis County is Lambert Airfield where passengers are picked up by the taxicabs waiting in line. Both companies, during the years in suit 1965 through 1968, had verbal agreements with their drivers for the operation of taxicabs exclusively of the type described herein, i.e., company owned taxicabs operated by drivers who receive their compensation by retaining a percentage of the fares collected. Licenses or franchises are also granted by St. Louis County to operators whose businesses involve drivers who own their own cabs, as well as operators whose businesses involve company owned taxicabs operated by drivers who pay the company a fixed daily or weekly payment for the cab.

The companies do not have formal business offices but are operated from the homes of their respective presidents. They do not advertise nor do they have listed telephone numbers in either the regular or classified pages of the telephone directory. The taxicabs owned by the companies are not radio equipped and the companies have no radio equipment or radio or telephone dispatchers. Members of the public do not telephone the homes of the presidents for a taxicab. The drivers do not regularly telephone the presidents to report their whereabouts or for instructions. Unless a president or his wife is at home a driver would not be able to contact the president. No effort is made to have someone regularly available at the presidents' homes to answer telephone calls pertaining to the taxicab business. In many instances, the drivers do not communicate with the respective presidents for days at a time. If it becomes necessary for a president to contact a driver, he can do so by leaving a message at the service station to be picked up by the driver at the end of his shift, or by calling the driver at home after working hours. In emergency situations, drivers are sometimes contacted

by calling a limousine service office at the airport and asking personnel there to relay a message to the airport taxicab starter for delivery to the driver when he appears. It would be possible for a president to drive by and leave such a message although this has never been done.

During the years in suit, 1965 through 1968, Air Terminal owned twelve (12) Fords, each of which is painted green, with the words "Lambert Airfield Cab, Co." painted in black letters on the door. Airway owned twelve (12) Chevrolets, each of which is painted green, with the words "Lambert Airport Cab, Co." painted in black letters on the door. The taxicabs are equipped with fare meters.

When not in use, the taxicabs owned by each company are parked at separate, independently owned service stations, in return for which, each company contracts out to the particular service station the minor maintenance and repair work that is to be done on the taxicabs. (By minor repairs are meant those types of repairs which service station personnel are normally able to accomplish.) Major repair work is arranged for by the company and contracted to others at company expense. Periodic checks and regular minor maintenance work are arranged for by the company and performed at the service stations at company expense. On a weekly basis, the company presidents check on the maintenance and repair work performed by the service stations.

These service stations are located nearby Lambert Airfield. The companies maintain no garages or maintenance facilities of their own. Neither company maintains regular supervisory personnel at the independently owned service station lots, and has no supervisory personnel other than the respective presidents. The respective presidents operate the businesses on a part time basis. On an irregular basis and from time to time the presidents check the mileage and trip readings of the fare meters as well as the mileage registered on the odometer of the taxicabs.

The companies carry liability insurance on their taxicabs, but do not carry nor have they ever carried collision or workmen's compensation insurance. The companies bear the risk of collision damage to their taxicabs. The drivers do not carry any insurance on their operation of the taxicabs.

During the years in suit the drivers of the companies' taxicabs operated in the following way:

(a) At the beginning of their shifts, each of the drivers picks up the taxicab he is to drive at the service station where the particular driver's company keeps the taxicabs pursuant to the maintenance-parking arrangement described above. The keys to the taxicabs are kept by the company in the service station office on a board when the taxicabs are not in use. While it is not company policy, some drivers have their own keys made and retain possession of them and the company does not object.

(b) From the service station, the drivers usually proceed directly to Lambert Airfield to pick up fare-paying passengers.

(c) After a passenger has been left at his destination, the drivers usually return directly to Lambert Airfield to pick up another fare-paying passenger. A driver makes an average of six (6) trips a day, consisting of transportation of a passenger from Lambert Airfield to the passenger's destination and return to the Airfield.

(d) The drivers maintain a trip sheet on which is to be noted the pick up point and destination of each fare-paying passenger and the amount of the fare paid by each passenger.

(e) The drivers by agreement may, and from time to time do, carry passengers for hire to places well

outside the limits of the metropolitan St. Louis area. In such instances, the trip is not recorded on the meter and a basic fare of ten cents ($.10) per mile (which is subject to negotiation between the passenger and the driver) is charged the passenger. The trip and the fare charged is recorded on the trip sheet maintained by the driver.

(f) The drivers by the terms of the St. Louis County franchise may pick up passengers by agreement with an individual passenger outside the unincorporated areas of St. Louis County. Usually this takes place when a driver agrees with an airport passenger to pick him up on his return to the airport.

(g) At the end of a shift, each driver deducts from the total amount of fares collected, the amount expended for gasoline and oil. The amount remaining is then divided equally between the company and the driver. The driver takes the company's share and puts it in an envelope then along with the trip sheet drops the envelope through a slot in a metal strong box at the service station where the taxicabs are parked when not in use. The driver retains his own share of the fares collected and receives no other remuneration. These envelopes are picked up regularly by the president of the company. The trip sheets and envelopes are furnished to the drivers by the companies.

(h) The drivers do not use the taxicabs for their personal use. At the end of their shift, the drivers return the taxicabs to the service station to be parked and left until the next shift.

The drivers who drive the taxicabs owned by the plaintiff companies, as well as drivers for other taxicab companies in the St. Louis and St. Louis County areas, are organized into and are members of Local 688, Warehouse and Distribution Workers Union, affiliated with the International

Brotherhood of Teamsters, Chauffeurs and Warehousemen of America. Both companies entered into identical labor contracts. (Copies of the pertinent labor contracts have been furnished to the Court.)

The stipulated issue of law is as follows:

> Whether plaintiffs were employers of their taxicab drivers for the purposes of the income tax withholding provision, the Federal Insurance Contribution Act (FICA), and the Federal Unemployment Tax Act (FUTA) for the years 1965 through 1968.

An "employer" is defined by Section 3401(d) of the 1954 Code as being "the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person." An "employee" is defined as:

> "(a) The term 'employee' includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee.
>
> * * * * * * *
>
> "(b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. * * * In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee." Reg. 31.3401(c)-1(a) (b).

And see, Treas.Reg. 31.3121(d)-1(c), and Treas.Reg. 31.-3306(1)-1(a) (b).

[1] There is no dispute that the common law rules are to be used in determining whether an employer-employee relationship exists, [H.Conf.Rep.No. 2771, 81st Cong., 2d Sess, p. 104 (1950-2 Cum.Bull. 365, 372)], and that the element of control is essential to the existence of such a relationship. See, United States v. W. M. Webb, Inc., 397 U.S. 179, 192, 90 S.Ct. 850, 25 L.Ed.2d 207 (1970).

The plaintiffs have cited cases raising the issue of the employee-employer relationship involving labor laws [e. g. Adams Dairy Company v. Dairy Employees Union, 363 Mo. 182, 250 S.W.2d 481 (Mo. 1952)], workmen's compensation laws [e. g. Dawson v. Clark Oil and Refining Corporation, 410 S.W.2d 353 (Mo.App.1966); Johnson v. Simpson Oil Company, 394 S.W.2d 91 (Mo.App.1965)] and tort liability [e. g. Sharp v. W. & W. Trucking Company, 421 S.W.2d 213 (Mo. En Banc 1967); Dean v. Young, 396 S.W. 2d 549 (Mo.1965)]. And defendant has cited a number of Missouri cases involving taxicab companies and their drivers. See, e. g., Harris v. Mound City Yellow Cab Co., 367 S.W.2d 43 (Mo.App.1963); Chastain v. Winton, 347 Mo. 1211, 152 S.W.2d 165 (Mo.1941). In each of the cases cited, the courts looked to a number of factors to resolve the basic issue of control as it pertained to the particular employment relationship before the Court. The same approach is applicable to the present case and the Court relies particularly on the taxicab company cases in the federal courts. See cases cited in United States v. Fleming, 293 F.2d 953, 956 (5th Cir. 1961); 10 A.L.R.2d 369.

In the case of Party Cab Company v. United States, 172 F.2d 87 (7th Cir. 1949), cert. denied 338 U.S. 818, 70 S.Ct. 62, 94 L.Ed. 496, the court noted the importance of the element of control and stated at pp. 92-93:

"As to the control which plaintiff exercised over the drivers, the Board in its brief states, 'The taxpayer controls whether a particular individual works, when his working shift begins, how long it may last, when it ends, which taxicabs he is allowed to use, and the fact that only a particular driver may operate a taxicab during the shift in question,' and it states further, 'and a much more realistic and effectual control is found in the undisputed fact that violation of the taxpayer's rules or regulations might result in the taxpayer's refusing to allow the offender to take out a taxicab again.'

"The weakness of this argument on control lies in the fact that the elements relied upon by the Board are matters which concern the plaintiff's business rather than the services performed by the drivers. The matter of control which is material is that which the plaintiff exercised over the drivers during the period they were in possession of the cabs rather than what the plaintiff might do either prior or subsequent to such period. Considered in this light, any control exercised by the plaintiff was quite meagre.

"During this so-called period of employment the plaintiff had no control over the area of operation or the number of miles which the cab was to be operated. It could not require the drivers to accept a call for a taxi received by it, to telephone the office or report his whereabouts, and could not require a driver to purchase gasoline or oil from it, or to account for fares collected or for tips or gratuities received. In fact, it appears that a driver had the same freedom as to the manner and means to be employed in the operation of a taxicab as would be possessed by any other car owner or driver. The remuneration which he received was dependent solely upon his own energy, initiative and business acumen, and the plaintiff was

not interested in how much money a driver made. Thus it appears that the plaintiff had little, if any, control over the details, means, and method by which the drivers performed their services, and while the plaintiff no doubt was interested in the operation to the extent that it was in the interest of its business that the public be satisfactorily served, we are unable to discern how it had any considerable authority over the accomplishment of such a result."

See, also, United States v. Fleming, *supra*; Woods v. Nicholas, 163 F.2d 615 (10th Cir. 1947).

In the present case, the factors indicating control by plaintiffs over their drivers are that plaintiffs fix the time and days which the drivers work; that the taxicabs are owned by plaintiffs; that the plaintiffs determine which taxicab will be driven by each driver; that plaintiffs periodically check mileage and fare readings; and that the plaintiffs can discharge a driver at will. Defendant also relies heavily on two additional facts: 1) the drivers are covered by a labor contract; and 2) the drivers paid plaintiffs a percentage of the fares rather than a fixed fee for use of the company-owned taxicab.

It is defendant's primary contention that a fare-splitting company is necessarily so interested in the amount of fares collected by its drivers that it exercises sufficient "control" to result in an employer-employee relationship [See United States v. Fleming, *supra*] while a fixed-fee payment indicates that the drivers are independent contractors.

[2] Each of the indicia of control set out by defendant is a factor to be considered, but the Court cannot accept defendant's contention that the fare-splitting arrangement is conclusive. The question of plaintiff's control over the manner and means of the operation of the taxicabs is a factual question. Considering all factors, the Court concludes

that the plaintiffs had little, if any, control over the means and method by which the drivers performed their services.

[3] There were no supervisory employees, no offices, no garages, no radios, no dispatchers, no telephones, no regular contact between plaintiffs and drivers, no workmen's compensation insurance, and no minimum wages. The drivers did not report to or "check in" with the plaintiffs in any way during the time they were in possession of the taxicabs. Plaintiffs had no way to contact the drivers, or to supervise or direct the activities of the drivers while they possessed the taxicabs.

It is not necessary to determine whether or not the plaintiffs' drivers are independent contractors or lessees. The Court finds that the plaintiff taxicab companies were not "employers" of their taxicab drivers for the purposes of the income tax withholding provision, FICA and FUTA for the years 1965 through 1968. Therefore the taxes were illegally assessed and collected and plaintiffs are entitled to recover, and defendant's counterclaims will be denied.

The parties have stipulated that the amount of the judgment is purely a matter of computation, and that "Upon the entry of a decision herein the parties will agree upon the amount of the judgment and if unable to do so will submit their disagreements to the Court for decisions."

The parties will be given fifteen (15) days from the date this Memorandum decision is entered within which to submit an agreed-upon computation of the amounts paid by plaintiffs, together with interest, and judgment will thereafter be entered.

APPENDIX C

CONFLICTING DECISION

Party Cab Co. v. United States of America

No. 9585

United States Court of Appeals
Seventh Circuit

Jan. 18, 1949

1. Master and servant key 1

The most important factor in determining employer-employee relationship is that of control, which the former either exercises or has authority to exercise over the latter.

2. Internal revenue key 1167.5

Where taxicab drivers retained fares and paid owner at fixed rate for use of taxicab, drivers paid for gas and oil but all other expenses were paid by owner, drivers were required to make no report to owner as to amount earned and owner had no control over area of operation, or number of miles which cabs were driven and could not require driver to accept a call, drivers were not "employees" within Social Security Act and owner was not liable for social security taxes. Social Security Act, §§ 801 et seq., 901 et seq., 1101 (a) (6); 42 U.S.C.A. §§ 1001 et seq., 1101 et seq., 1301 (a) (6).

SWYGERT, District Judge, dissenting.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division; Philip L. Sullivan, Judge.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Employee".

Action by Party Cab Company against the United States of America to recover taxes alleged to have been illegally assessed and collected. From a judgment for defendant, 75 F.Supp. 307, the plaintiff appeals.

Reversed and remanded with directions.

Phillip E. Freed, and Harry G. Fins, both of Chicago, Ill., for appellant.

Theron L. Caudle, Asst. Atty. Gen., Arthur L. Jacobs, Dept. of Justice, of Washington, D. C., and Otto Kerner, Jr., U. S. Atty., of Chicago, Ill., George A. Stinson and Ellis N. Slack, Special Assts. to the Atty Gen., and Leroy R. Krein, Asst. U.S. Atty., of Chicago, Ill., for appellee.

Peter B. Atwood, John Kiely, Edwin F. Zukowski, and Walker, Atwood, Zukowski & McFarland, all of Chicago, Ill., amicus curiae.

Before MAJOR, Chief Judge, SPARKS, Circuit Judge, and SWYGERT, District Judge.

MAJOR, Chief Judge.

This is an appeal from a judgment adverse to the plaintiff (the taxpayer), entered January 21, 1948, in a suit to recover from the defendant taxes alleged to have been illegally assessed and collected under the provisions of Title VIII and IX of the Social Security Act, hereinafter referred to as the Act, 42 U.S.C.A. §§ 1001 et seq., 1101 et seq.

Plaintiff is an Illinois corporation organized "to operate taxicabs and automobiles for hire as a public and private carrier of freight and passengers; to buy and sell and deal in automobiles." The question for decision is whether the persons designated as the drivers of plaintiff's taxicabs are, under the terms of the Act, its employees whose earnings are wages so as to make the plaintiff liable for the tax sought to be recovered. The court below made findings of fact and conclusions of law upon which its judgment

was predicated. The court also rendered a written opinion, reported in D.C., 75 F.Supp. 307.

That we are presented with a perplexing problem is evident from the opposing results which have been reached and the contrariety of views expressed in a number of cases. Referring only to the Federal cases, taxi drivers have been held to be employees in Jones v. Goodson, 10 Cir., 121 F.2d 176; Checker Taxi v. Harrison,[1] D.C.Ill., Nor.Dist., East Div., decided July 1, 1942; Kaus v. Huston, D.C., 35 F. Supp., 327 (affirmed without deciding the merits, 8 Cir., 120 F.2d 183), and Michigan Cab Co. v. Kavanagh, D.C.Mich., East Dist., Sou. Div., 82 F.Supp. 486. Such drivers have been held not to be employees in Woods v. Nichols, 10 Cir., 163 F.2d 615; Magruder v. Yellow Cab Co., 4 Cir., 141 F.2d 324, 152 A.L.R. 516; United States v. Davis, 81 U.S.App. D.C. 35, 154 F.2d 314, and Co-Op Cab Co. v. Allen, D.C.Ga., 82 F.Supp. 695 (pending on appeal in the Fifth Circuit).

The court below, as the extensive quotations in its opinion disclose, relied strongly upon the rationale of the Supreme Court in United States v. Silk., 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757. While the workmen involved in that case were not taxi drivers, the rule which the court announced in determining whether they were employees within the meaning of the Act is pertinent, subject to any change resulting from subsequent legislative action.

A study of the cases where the question has been considered discloses that varying facts account in no small measure for the contrary results which have been reached. Another factor which has played a large part is the policy pursued by the Social Security Board (hereinafter referred to as the Board) and the courts in the broadening of the concept of the term "employee" and the consequent inclusion within the coverage of the Act of a number of per-

[1] No opinion for publication.

sons who are not in ordinary usage looked upon as employees. Prior to a consideration of the facts in the instant matter, we regard it as important to note this policy of the Board and the courts which was resented by Congress and which in 1948 culminated in certain amendments to the Act expressly designed to restrict its coverage.

While the original Act enacted in 1935 defined a number of terms, it set forth no definition of the term "employee" other than that it "includes an officer of a corporation." Sub-sec. (a) (6), 42 U.S.C.A. § 1301. The term was implemented by Treasury Regulation 90, promulgated under Title IX of the Act, particularly Article 205 thereof. This regulation is set forth in a footnote in United States v. Silk, supra, 331 U.S. at page 714, 67 S.Ct. 1463, 91 L.Ed. 1757, and reference is made thereto. The regulation in the main followed the accepted common law test for determining the existence of the employer-employee relation. In 1939, the Board made certain recommendations to Congress for changes in the Act; with the view of broadening the definition of the term "employee." No changes were made, and the congressional intent appears to have been that the common law test be retained as embodied in the regulations theretofore promulgated by the Treasury.

Despite the refusal of Congress to broaden the scope of the word "employee" as defined in the Act, the Board apparently attempted to do so by administrative interpretation. It was argued before the courts that the term was not to be used as a word of art but rather that it should be defined in the light of the purpose of the statute and of the evils which were intended to be remedied. Similar arguments were advanced in connection with the interpretation of the term "employee" under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. In N. L. R. B. v. Hearst Publications, Inc., 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170, the Supreme Court embraced the interpretation

thus sought and expanded the definition of the word "employee" beyond anything which had ever been included before, and stated that the term must be understood with reference to the purpose of the Act and the facts involved in the economic relationship between the employer and the alleged employee. It held that where all the conditions of the relationship require protection, giving due consideration to the purposes of the Act, protection ought to be given. This expanded definition of the term "employee" as used in the Labor Act was in the main followed in United States v. Silk, supra, in determining its scope under the Social Security Act. The court stated, 331 U.S. at page 712, 67 S.Ct. at page 1467, 91 L.Ed. 1757:

"As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation."

A reading of this opinion leaves us in some doubt as to whether the court in defining the term "employee" intended to go beyond the scope of its common law meaning as outlined in the Treasury Regulation. Some of the language used indicates either that the court did so or in any event that a court would be justified in so doing. Mr. Justice Rutledge evidently thought that the court was going beyond the common law concept of the term, as is shown by the following statement in his concurring opinion, 331 U.S. at page 721, 67 S.Ct. at page 1472, 91 L.Ed. 1757:

"Here the District Courts and the Circuit Courts of Appeals determined the cases largely if not indeed exclusively by applying the so-called 'common law control' test as the

criterion. This was clearly wrong, in view of the Court's present ruling."

The Treasury Department also evidently thought that the Supreme Court in the Silk case had enlarged the scope of the term "employee" because shortly after the rendition of the opinion in that case it proposed a new regulation outlining the factors to be considered in making such determination. Federal Register, Vol. 12, No. 232, page 7966. Without quoting its proposed regulation, it is sufficient to note that it went far beyond any common law concept of the term "employee".

The decision of the Supreme Court in the Silk case and the proposed regulation by the Trasury Dpartment gave rise to a controversy in Congress as to the interpretation which should be given the term "employee" under the social security legislation. As a result, in the 80th Congress, Second Session, there was introduced in the House, H.J.R. 296, reported out of the Ways and Means Committee on February 3, 1948, bearing the title, "Maintaining the Status Quo in Respect of Certain Employment Taxes and Social Security Benefits Pending Action by Congress on Extended Social Security Coverage." The resolution as introduced was passed by both Houses of Congress and amended, Sec. 1101(a)(6) of the Social Security Act, to read as follows:

"The term 'employee' includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules."

We think it should be noted that Congress by the language thus employed did not exclude from coverage merely

those who have the status of an independent contractor but, without describing them, others not employees under common law rules. This observation is relevant beause the problem has often been considered as though there was a single alternative, that is, that the person in question must be treated either as an employee or as an independent contractor. In fact, the Board in the instant case reasons that the taxi drivers were not independent contractors and therefore they must be employees, thereby ignoring the language of the amendment which recognizes that there may be those other than independent contractors who do not come within the scope of the term "employee."

Upon submission to the President of the amendment to Sec. 1101(a) (6), it was rturned to Congress with the veto of the President, with his comment that "despite representations to the contrary * * * this resolution would exclude from the coverage * * * up to 750,000 employees, consisting of substantial portions of persons working as commission salesmen, life insurance salesmen, piece workers, truck drivers, **taxicab drivers**, * * * and others." (Emphasis ours.) The President in his veto message also stated, "In June 1947, the Supreme Court held [evidently referring to the Silk case] that these employees have been justly and legally entitled to social security protection from the beginning of the program in 1935."

The resolution was then passed as Public Law No. 642, 80th Congress, Second Session, over the President's veto. The resolution also contained a provision making the amendment defining the term "employee" retroactive to August 14, 1935, the date of the original enactment.

When the resolution was before the House on the motion to pass it over the President's veto, Representative Gearhart, who was in charge, made a statement concerning the decision of the Supreme Court in the Silk case, the proposed regulation of the Treasury Department, as well

as the congressional purpose for the amendment. We think it material to quote this statement.[1]

That Congress was highly resentful and critical of this attempt to broaden the coverage scope of the Act is abundantly disclosed by Committee Report No. 1319 of the House Ways and Means Committee and Senate Report No. 1255 of the Committee on Finance, which reports were made in connection with H.J.R. 296.

It would unduly prolong this opinion and perhaps serve no useful purpose to refer to these reports in detail. In substance, they contain numerous accusations that Congress regarded the broadening scope of the term "employee," as contained both in the Social Security Act and in the Labor Act, as an usurpation by the courts and the administrative agencies of the congressional legislative function. And there can be no doubt that Congress in-

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[1] "However, there crept into these decisions a little of what lawyers call obiter dicta; that is, some words which were quite unnecessary to the result. These words were to the effect that, for purposes of social security, the Social Security Administration was not necessarily bound in extending the social-security coverage, by the ancient common-law definition of master and servant, or employer and employee, as you may choose to call it, but that they could take into the system as employees any persons who were dependent upon a business in the light of economic realities, thereby throwing into the entire system a confusion which required immediate legislative attention.

"The Social Security Administration and the Treasury proceeded immediately to prepare a departmental regulation to carry that obiter dicta definition into effect. If this Congress had not interfered, tens of thousands of people in America, who never dreamed they were employed by anybody and never for one moment thought they were covered by social security or subject to payroll taxes would have found that they had been swept into the social-security system by bureaucratic ukase. In other words, they would suddenly have found that they had more employers than a dog had fleas. So, to end this confusion, this Congress acted promptly, and, after thoroughgoing debate, and by a vote of nearly 7 to 1, proceeded by legislation to put the matter in order once again by restoring the ancient doctrine of the common law defining the relation of master and servant, employer and employee." (Congressional Record Vol. 94, Pages 8268-8269, (advance part) June 14, 1948.)

tended to and did materially limit the term "employee" as it had been construed and applied by the administrative agencies and the courts. It established in plain and certain terms that the common law test and that only was to be applied, and again and again in the committee reports it is stated that the common law rules to be invoked must be "realistically applied."

The preceding discussion concerning the amendment to Sec. 1101 and the congressional purpose may be thought to be irrelevant because the Board does not dispute but that the question in the instant case must be determined in accordance with the common law concept of the term "employee." Its importance, however, lies in the fact that the courts generally, including those cases here relied upon by the Board, have interpreted the term so as to enlarge its scope beyond such concept, and it means that such cases and the rationale thereof carry little, if any, weight at the present time. And it is pertinent to observe that the lower court in the instant case relied largely on Jones v. Goodson, supra, and United States v. Silk, supra, both of which, and particularly the latter, as already shown, interpreted the term "employee" so as to encompass an area considerably greater than a court would now be justified in doing, and we have no way of knowing what the decision of the lower court would have been had it been confronted by the amendment of 1948 with its accompanying congressional history and purpose.

This brings us to a consideration of the facts which are embodied in detailed findings by the lower court, the more salient of which are incorporated in its opinion, D.C., 75 F.Supp. 307. For the purpose of our decision we think a brief résumé is sufficient.

Plaintiff during the taxable year involved owned twenty-two taxicabs which it was authorized to operate. It procured all city and state licenses, as well as personal injury

insurance required by Illinois for their operation. It was listed in the classified telephone directory as offering taxicabs for hire, and it had an office equipped with telephones and a garage with mechanics for the repair and maintenance of its equipment. The drivers operated plaintiff's cabs under an oral agreement which existed only from day to day; in other words, a driver was assigned a particular taxicab to drive during a single day or night shift, which shift began and ended at a time determined and fixed by the plaintiff. The drivers paid the plaintiff $8.00 for the use of a cab during the day shift and $9.00 for its use during the night shift. The drivers paid for the gas and oil which they used in operating the cabs, but all other expense such as maintenance, upkeep, license fees, etc., were paid by the plaintiff. Occasionally the plaintiff called meetings of the drivers to give instructions on such subjects as safe driving, forbidding drinking while on duty, how to avoid and what to do in case of accidents. The drivers had no business telephones and, although not required to do so, accepted calls received in plaintiff's office. Their principal business was derived by cruising the streets of the city. The drivers had no license to operate taxicabs for hire and the operation was conducted under licenses owned by the plaintiff. The drivers received all their pay or compensation from the public. They were required to make no report to the plaintiff as to the amount so earned and received, and the plaintiff had no interest therein.

This court in Williams v. United States, 7 Cir., 126 F.2d 129, decided that the leader of a dance orchestra was not an employee of the establishment for which the orchestra performed. In doing so, we applied the common law test, and the Board here relies heavily upon the factors there enumerated, such as the right to hire and discharge persons doing the work, the method and determination of the manner of the payment of the workmen, whether or not

the person doing the work is engaged in an independent business or enterprise, particularly, whether he stands to make a profit on those workers under him, which party furnishes the tools or materials with which the work is done, and who has control of the premises where the work is done. The factors thus enumerated are not inconsistent with Treasury Regulation 90, promulgated under the Social Security Act, which emphasizes "generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. * * * In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee."

[1] Thus it appears that the most important factor in determining the employer-employee relationship is that of control, which the former either exercises or has the authority to exercise over the latter. In this connection, the court below found that the plaintiff did exercise "a reasonable amount of control over the methods and means by which the drivers performed their services." A finding of this character has been regarded as sufficient in Jones v. Goodson, supra, and in Hearst Publications, Inc. v. United States, D.C., 70 F.Supp. 666. Notwithstanding that such a finding may be sufficient in some cases, we think that what amounts to "a reasonable amount of control" is a relative term and as a factual statement is uncertain and indefinite.

As to the control which plaintiff exercised over the drivers, the Board in its brief states, "The taxpayer con-

trols whether a particular individual works, when his working shift begins, how long it may last, when it ends, which taxicabs he is allowed to use, and the fact that only a particular driver may operate a taxicab during the shift in question," and it states further, "and a much more realistic and effectual control is found in the undisputed fact that violation of the taxpayer's rules or regulations might result in the taxpayer's refusing to allow the offender to take out a taxicab again."

The weakness of this argument on control lies in the fact that the elements relied upon by the Board are matters which concern the plaintiff's business rather than the services performed by the drivers. The matter of control which is material is that which the plaintiff exercised over the drivers during the period they were in possession of the cabs rather than what the plaintiff might do either prior or subsequent to such period. Considered in this light, any control exercised by the plaintiff was quite meagre.

During this so-called period of employment the plaintiff had no control over the area of operation of the number of miles which the cab was to be operated. It could not require the drivers to accept a call for a taxi received by it, to telephone the office or report his whereabouts, and could not require a driver to purchase gasoline or oil from it, or to account for fares collected or for tips or gratuities received. In fact, it appears that a driver had the same freedom as to the manner and means to be employed in the operation of a taxicab as would be possessed by any other car owner or driver. The remuneration which he received was dependent solely upon his own energy, initiative and business acumen, and the plaintiff was not interested in how much money a driver made. Thus it appears that the plaintiff had little, if any, control over the details, means, and method by which the drivers performed their services, and while the plaintiff no doubt

was interested in the operation to the extent that it was in the interest of its business that the public be satisfactorily served, we are unable to discern how it had any considerable authority over the accomplishment of such a result.

The Board suggests that the plaintiff had the unlimited right to discharge by refusing to allow a driver to take out a cab. This is rather a novel application of the meaning ordinarily attributed to the word "discharge." The same argument could be made in any case where one person refuses to hire or lease an instrumentality to another, and the fact that it could refuse to renew an agreement with a driver is equally consistent with the status of an independent contractor as it is with the employee relationship.

The Board argues that the drivers are not independent contractors and, therefore, they must be employees. It is pointed out that the drivers have no capital investment, no business telephone, no regular place of business and do not advertise. And we suppose it is true, as asserted by the Board, that "the drivers go out of 'business' at the pleasure of the taxpayer, in which event they are in effect 'out of a job' like any wage earner." It is hardly accurate, however, to say that the drivers have no capital investment, when they furnish the oil and gas and the labor by which they earn a livelihood. In fact, the relation between the plaintiff and the drivers appears more like some kind of a joint venture, wherein the plaintiff provides the facilities for a fixed charge and the drivers contribute the fuel, their skill, energy and labor. It is pointed out that the drivers have no opportunity for profit and loss of investment, but this ignores the fact that the amount of their earnings is dependent wholly upon their own efforts. Assuming, however, that the drivers cannot be properly classified as independent contractors in the common acceptance of that term, it does not necessarily

follow that they are "employees" within the meaning of the Act. An affirmative conclusion that they are such employees cannot be arrived at by the process of elimination. As we have heretofore shown, Congress by its 1948 amendment recognized that under the common law there are those other than independent contractors who are not employees.

Another factor which we think strongly militates against the employer-employee relationship is that the "wages" which afford the basis for the tax were received from the public and not the plaintiff. And the services performed by the drivers and for which such "wages" were received were rendered directly to the public. Thus the public received the benefit of their services and compensated them therefor. To us it is an anomaly to reason that the drivers were employed by the plaintiff but that they served and received their entire compensation from the public. To hold that the drivers were employees under such circumstances does not, in our view, meet the intent and purpose that the usual common law rule shall be "realistically applied."

Moreover, while there is respectable authority to the contrary, we have serious doubt that it was intended by Congress that the tax should be levied upon "wages" thus earned and received. Sec. 1011(a) defines the term "wages" as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." Paragraph (b) of the same section defines the term "employment" as "any service, of whatever nature, performed * * * by an employee for his employer." It requires a strained construction to think that the remuneration thus defined includes that received from the public for services rendered on its behalf. Sec. 1002 requires that the tax shall be collected by the employer "by deducting the amount of the tax from the wages as

and when paid." Sec. 1004 fixes the rates of taxation "equal to the following percentages of the wages paid by him" (the employer). All through the Act reference is made to compensation "payable by him," meaning, of course, the employer. For further illustration see Secs. 1101, 1102 and 1109.

While we need not and do not decide that "wages" paid by the public could not in any case form the basis for the tax, we do think it is a circumstance in the instant situation which strongly dispels the idea that the drivers were employees of the plaintiff within the meaning of the Act.

Treasury Regulation 91 promulgated under Title VIII of the Social Security Act excludes from the computation of wages "tips or gratuities paid directly to an employee by a customer of an employer, and not in any way accounted for by the employee to the employer." In the instant situation, neither the charges made by the drivers nor the tips or gratuities received are accounted for to the plaintiff; in fact, the plaintiff is not and has no reason to be any more interested in one than in the other.

The incongruous situation which the Board's reasoning leads to is highlighted by assuming that a driver charges and receives from his passenger $1.00 for a ride and at the same time receives a tip of 25¢. The plaintiff under the regulation need not concern itself with the amount received as a tip but in some unexplainable and mysterious manner must learn of and account for the $1.00 which the driver has received as compensation from his passenger. So far as we are able to discern, there is no more logic or reason for requiring the plaintiff to account for and pay a tax upon one item of receipt by the driver than the other.

[2] While there is room for argument on both sides of the question presented for decision, we are of the view that

under the amended definition of the term "employee," taking into consideration as we must the congressional purpose and direction, the drivers under the circumstances of the instant case are not included within the term. It follows that the tax was illegally assessed and collected and that the plaintiff was entitled to recover.

The judgment appealed from is, therefore, reversed and remanded, with directions that a judgment be entered in favor of the plaintiff.

SWYGERT, District Judge (dissenting).

This case lies within the borderland of what is clearly an employee-employer relationship and what is manifestly an independent contractor status. There is no doubt that a determination of the plaintiff's liability must be measured by applying the usual and applicable common-law rule. As the Court points out, if there has been any tendency to adopt a different or broader rule in cases arising out of the enforcement of the Social Security Act, the courts are now constrained from doing so by Joint Resolution 296, Public Law 642, 80th Congress, 2d Session.

Difficulty is encountered, however, in applying the common-law rule because, as in many borderline cases, different factors point in opposite directions. But I am of the view that the circumstances which indicate that these taxicab drivers are employees outweigh those which may indicate otherwise.

The plaintiff owned the taxicabs and the necessary operating licenses. It had a garage where those vehicles were housed and serviced, except for the gas and oil which was paid for by the drivers. It was listed in the telephone directory as offering taxicabs for hire and it employed three telephone operators who received calls for taxicab service although the drivers were not required to answer

these calls. The drivers had no investment in equipment and no separate business apart from operating the plaintiff's taxicabs. They were required to operate their cabs during specified periods and on a day-to-day basis. Periodically the plaintiff instructed the drivers on such subjects as safe driving, forbidding drinking while on duty, how to avoid accidents, what to do in case of accidents, and what to do with articles left in cabs by passengers. If a driver disobeyed any of the company's rules or regulations, it could refuse to permit him to take out and operate a taxicab.

These circumstances are, in my opinion, the determinative factors indicating that these taxicab drivers are employees. The business of the plaintiff was the operation of taxicabs for hire. The drivers' jobs were an integral part of that business and not an incident to it. It is my view that the plaintiff's control or right to control these drivers as to the hours they should work and the manner in which their work was to be performed was sufficient to meet the test of the common-law rule.

For these reasons, I would affirm the judgment of the District Court.